Supreme Court, U.S.
FILED
JAN 28 2003
CLERK

No. 02-751

IN THE

Supreme Court of the United States

SUN PRAIRIE, A PARTNERSHIP,

Petitioner,

v.

AURENE M. MARTIN, ACTING ASSISTANT SECRETARY FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, GALE A. NORTON, SECRETARY OF THE INTERIOR, ROSEBUD SIOUX TRIBE, CONCERNED ROSEBUD AREA CITIZENS, SOUTH DAKOTA PEACE AND JUSTICE CENTER, PRAIRIE HILLS AUDUBON SOCIETY, and HUMANE FARMING ASSOCIATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF

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1. The Federal Defendants[1] concede that "[t]he court of appeals . . . did not properly apply" the prudential standing principles which this Court has set out, and that "[t]he court of appeals' decision is accordingly mistaken." Fed. Br. in Opp. at 6. They concede that, although non-Indians who are only would-be lessees generally do not have standing under the statutory provisions at issue, "the court of appeals erred, however, in failing to recognize the significantly different situation that arises once the Interior Department has formally approved a proposed lease, but then withdraws its approval." *Id.* at 8. They admit that "when the Interior Department makes the decision to withdraw a previous approval of a proposed lease, the Interior Department does so in the face of the ripened expectations of both the Indian lessor and the non-Indian lessee who may have taken action or made financial commitments based on the approval," and that, "[i]n those circumstances, it is reasonable to conclude that Congress intended that the non-Indian lessee may seek judicial review of the Interior Department's withdrawal decision." *Id.* at 8-9. They state that "the court of appeals erred in concluding that petitioner lacked prudential standing to pursue its claim," they "submit[] that the court of appeals should not have relied on prudential standing as a basis for dismissing petitioner's complaint," and they agree that what should have happened is that the court of appeals should have "recognize[d] its error and decide[d] the merits of whether the Interior Department acted lawfully in withdrawing its approval." *Id.* at 9.

Despite all of the above, however, the Federal Defendants assert that the court of appeals' error does not warrant this Court's review because "this Court does not ordinarily grant

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1. Pursuant to this Court's Rule 35.3, a current officeholder has again been substituted in the caption.

review to examine a court of appeals' application of settled legal principles to a particular factual situation," and there is "no reason to do so in this case, which presents highly unusual facts that are very unlikely to recur." *Id.* at 10.

In fact, however, there are important reasons for the Court to grant review. Although the Federal Defendants suggest that the case merely involves "application of settled legal principles," they also concede that "the court of appeals itself did not identify any controlling precedent," *id.* at 9, and indeed themselves assert that the court of appeals was "faced with the absence of controlling precedent," *id.* at 10. If the cases of this Court cited by petitioner are not "controlling precedent," then the principles are not settled, at least not enough for a court of appeals to apply them correctly. And if the principles are settled by previous decisions of this Court, then, as the Federal Defendants elsewhere concede, they are precedents "requiring the federal courts" to follow them, *id.* at 6, and the court of appeals' decision failing to follow them here is in conflict with those precedents, and that conflict should not be allowed to stand.

Moreover, the pertinent facts here are not "highly unusual." The facts pertinent to the question presented are that a party required by federal law to obtain government approval obtained that approval. The question is whether such a party, who concededly has Article III standing, has prudential standing under that same federal law to complain if it believes that approval was improperly revoked? It is no comfort to such a party – or to a prospective investor who must obtain such approval – for the government to say it will not need to worry about standing most of the time because it will not be harmed if the government does not withdraw the approval. The question is what right to complain

will such a party have in those events when it is so harmed, and the answer given by the court of appeals currently is "none."

Tellingly, the Federal Defendants do not disagree that "this case may discourage non-Indian investment and depress economic development in Indian country." *Id.* at 11. They merely "do not believe that that concern warrants review of the issue presented here in the present circumstances, especially in the absence of a circuit conflict." *Id.* In addition to showing a remarkable lack of concern for investment and economic development in Indian Country in the seven states and approximately 30 reservations within the Eighth Circuit, the Federal Defendants discount the conflict with the precedents of this Court that they otherwise concede are controlling and the chilling effect that a denial of review of this decision would have on investment and development in those parts of Indian Country lying outside the circuit as well.[2]

Moreover, even if "the present circumstances" really did counsel against full review, there would be no need to jeopardize that investment and development. Where, as here, the federal government has conceded error on the part of the lower court, summary disposition of the case, reversing the standing decision and remanding for a determination of the merits, would be entirely appropriate. *See* Sup. Ct. R. 16.1. The parties would then be able to obtain the merits disposition to which most of the arguments of the Intervenor Defendants

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2. Whether petitioner does or does not succeed in a separate suit asserting a Due Process violation, *see* Fed. Br. in Opp. at 11, will not change the court of appeals' erroneous prudential standing decision or alter its chill on investment and development. Moreover, the Federal Defendants fail to inform the Court that they have already moved to dismiss that action.

and the Tribe are directed, and the incorrect prudential standing decision of the court of appeals would not continue to stand as a precedent that even the federal government concedes is wrong.

2. The Intervenor Defendants claim the appellate court was somehow not fully "put on notice" regarding the standing issue that is the subject of this Petition. This assertion is completely baseless,[3] and is notably not joined in by the Federal Defendants. Sun Prairie's standing was not challenged before the District Court. The issue of prudential standing was first raised on appeal by the Intervenor Defendants, as but one of a host of arguments.[4] Sun Prairie asserted that it possessed prudential standing and was within the "zone of interest" of Title 25 of the United States Code

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3. The authority relied upon by the Intervenor Defendants provides no support for their argument. In *United States v. Bestfoods*, 524 U.S. 51, 72-73 (1998), the Court determined the merits of the question before it and then remanded for further factual findings regarding the extent of a parent company's operation of its subsidiary, an issue which had not been examined by the district court, and in *Holly Farms Corp. v. N.L.R.B*, 517 U.S. 392, 400 n.7 (1996), the Court declined to address Holly Farms' attempt to redefine on appeal the type of farming in which it was engaged. Neither of these cases involved standing issues or how they were addressed below. And even if they were merely cited for the more general point that the Court does not usually address arguments that were not the basis for the decision below, here prudential standing was the explicit and sole basis for the Eighth Circuit's decision.

4. As noted in the Petition (at 8 n.7), if anything it is the Intervenor Defendants' argument regarding standing, not Sun Prairie's defense thereof, that "matured too late." *See Pershing Park Villas Homeowners Assn. v. United Pacific Ins. Co.*, 219 F.3d 895, 899-900 (9th Cir. 2000).

in its initial brief as appellee (Sun Prairie Br., Nov. 1, 2000, at 16-18) and again in its petition for rehearing. The appellate court was well aware of the question presented in this Petition, including particularly the fact that Sun Prairie was an actual lessee objecting to withdrawal of a previous federal lease approval,[5] but, as the Federal Defendants agree, simply got the answer wrong.

3. The Tribe claims that Sun Prairie has "no interest or stake" in Indian land other than a devious intent to pollute the environment. Tribe Br. in Opp. at 1. This averment is both false and disappointing. The Tribe ignores Sun Prairie's interest in the Lease[6] and in its substantial investment in the Project, which was the culmination of a business relationship

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5. *See, e.g.*, Ct. of App. Opinion, Pet. App. 2a-3a:

> This case arises from the Rosebud Sioux Tribe's lease of land to Sun Prairie. . . . Because the lease covers land included within the Rosebud Indian Reservation, the Bureau of Indian Affairs (BIA) had to review and approve the lease. . . . BIA . . . approved the lease, which the Tribe and Sun Prairie executed. Almost five months later, the former Assistant Secretary for Indian Affairs . . . voided the lease. . . . Sun Prairie and the Tribe filed suit. . . .

6. The Tribe goes so far as to say that if a federally approved lease on Tribal land faces any questioning or opposition, even after the time to challenge that lease by appeal has expired, the non-Indian party should be treated as if it lacked a valid lease (*Id.* at 15-16). If that is the "lesson" to be drawn from this case, any unhappy individual can, by complaint or merely by a disapproving letter, immediately arrest the contractual rights of non-Indian lessees – a proposition that will certainly chill any potential investor from leasing Indian land.

solicited by the Tribe after a detailed Needs Assessment, contained in the record below,[7] in which the Tribe itself (years before it approached Sun Prairie) determined that a hog farm was a developmental opportunity that should be pursued. The Tribe admits that it initially supported the Project. *Id.* at 5 n.2. In fact, it executed the Lease and joined Sun Prairie before the district court to ask for a permanent injunction to prevent interference with the Lease, which injunction was ultimately granted. The Lease was in effect for well over a year – and millions of dollars were spent on development – before a new Tribal administration decided that it no longer wished be bound by the Lease's terms. It is not uncommon for government administrations to change; but such change does not impact the contractual obligations entered into by a previous administration. Likewise, a change in the political winds should not impact a non-Indian party's standing to defend a contract between itself and the Tribe that has been executed and federally approved.

4. The authority the Intervenor Defendants and the Tribe rely upon to support their prudential standing analysis is, in large part, a reiteration of cases that were previously referenced in the Eighth Circuit's opinion and which Sun Prairie has previously distinguished. *See, e.g.*, Pet. at 18 n.10. One new citation offered by the Intervenor Defendants is *In re Sanborn*, 148 U.S. 222, 223 (1893), but that case is completely inapposite here. *In re Sanborn* involves the availability of an appeal to this Court from an interim advisory decision of the Court of Claims in a pending agency proceeding. It does not address the revocation of a federal approval under Title 25 of the United States Code, nor does it address issues of prudential standing.

7. Admin. Rec., Vol. 1 at 280 (Rosebud Sioux Tribe Municipal, Rural, and Industrial Water Needs Assessment Final Report, July 1993, at § 5.1.2.2).

5. The Tribe and the Intervenor Defendants take great liberties in their descriptions of the genesis of the Project and its operation – and cast aspersions regarding Sun Prairie's motives – referring primarily to "facts" that are not in the record or that address the merits but not the question presented. As noted above, the facts pertinent to the question presented are few, clear, and uncontested: The BIA, acting under its delegated authority under 25 U.S.C. §§ 81 and 415, approved the Lease on September 16, 1998; and then, to resolve a third-party lawsuit in which neither the Tribe nor Sun Prairie were parties, attempted unilaterally to revoke its approval and void the Lease on January 27, 1999.

Beyond that, a sufficient response is to note that the facts underlying the merits of this case have already been examined and determined at length by the district court. *See* Pet. App., 18a-22a (genesis and development of the Project); 40a to 56a (sufficiency of the environmental review performed on the Project). The Intervenor Defendants argue that Sun Prairie is unlikely to win this case on the merits, but the district court – the only tribunal to reach the merits of this case – after reviewing the record and conducting a two-day evidentiary hearing, found in favor of Sun Prairie's claims, holding, among other things, that the Assistant Secretary's attempt to void the lease was "untimely and thus invalid" (Pet. App. at 31a), that the Assistant Secretary's letter purporting to void the lease was "conclusory and offered absolutely no legal analysis or factual explanation" (*id.*), that the Assistant Secretary "had no authority to reconsider the FONSI and void the lease" (*id.* at 32a), and that the environmental review performed on the Project was sufficient (*id.* at 55a-56a).

The broad implications of this case were also acknowledged by the district court:

> [T]he failure of this project based on administrative ineptitude and procedural unfairness would absolutely deter private entities and lending institutions from pursuing economic relationships with various tribes.
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> * * *
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> It is high time that the BIA conduct its affairs in a timely and business-like manner to give confidence to Tribes, all Native Americans, their business partners, and lending institutions so that they can rely upon the BIA to do what they say they are going to do. The principles of equity dictate that the Assistant Secretary's decision cannot be upheld.

Pet. App. at 36a-37a and 40a (internal quotations omitted). The district court correctly recognized that the value of any lease or contract becomes ephemeral and its term becomes superfluous if the federal government can void it at will and without challenge.[8] It is both reasonable and likely that such uncertainty will chill investment on Indian land. Even the Intervenor Defendants admit (albeit in a separate context) that this case "provides a lesson to others." *Id.* at 5.

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8. The fact that the Tribe has a functioning tribal court with a full-time staff (Tribe's Br. in Opp. at 12) provides particularly little comfort where, as here, the arbitrary and capricious action is taken by the federal government – not the Tribe.

Both Sun Prairie and the Federal Defendants agree that Sun Prairie has prudential standing and that the Eighth Circuit erred in not so holding. That prudential standing question is all that is at issue on this Petition, and it is clearly and squarely presented. The court of appeals' answer to that question conflicts with the standing principles set out by this Court, and failure to address and correct that answer will have an important and deleterious effect on investment in and development of Indian lands.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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